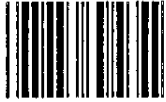


USDC SCAN INDEX SHEET



PRICE

COUNTY OF SAN DIEGO

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3:94-CV-01917

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SEP 3

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11 IN THE UNITED STATES DISTRICT COURT
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13 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
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11 ANN PRICE, et al.,)	No. 94-1917-R(AJB)
)	
12 Plaintiffs,)	
)	
13 v.)	
)	
14 COUNTY OF SAN DIEGO, et al.,)	Date: October 28, 1996
)	Time: 10:30 a.m.
15)	Place: Courtroom 5
16 Defendants.)	Judge: Hon. John S. Rhoades

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21 MEMORANDUM OF POINTS AND AUTHORITIES
22 IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
23 BY DEFENDANTS COUNTY OF SAN DIEGO AND JIM ROACHE
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1 INTRODUCTION

2 On June 28, 1994, Poway Sheriff's deputies confronted a violent
3 suspect, Plaintiffs' decedent Daniel Price ("Price"), who they placed
4 into a four-point restraint (commonly referred to as a "hogtie").
5 Price lost consciousness after he was hogtied then died two days later
6 at Pomerado Hospital. The hospital's pulmonary consultant attributed
7 Price's condition to a cardiac arrest due to exertion and
8 methamphetamine ingestion. The Medical Examiner's autopsy report
9 concluded that Price died from positional asphyxia caused by the
10 application of the hogtie. Based primarily on that autopsy report,
11 Price's estate, surviving spouse, two children and parents¹ sue the
12 County of San Diego, former Sheriff Jim Roache, Deputies John Groff,
13 Steven Clause, Samuel Sheppard and Mark Talley for negligence, civil
14 rights violation under Cal. Civ. Code § 52.1, negligent hiring
15 training and supervision, excessive force, and municipal federal civil
16 rights violation under 42 U.S.C. § 1983.

17 Discovery has revealed that the autopsy report was based on a
18 variety of assumptions regarding the hogtie's physiological effects on
19 respiration which assumptions are not supported by any medical
20 evidence. Since the inception of this case, the University of
21 California San Diego Medical Center has completed a scientific study
22 that conclusively establishes that the hogtie does not cause asphyxia.

23 ///

24 _____
25 ¹Price's parents have standing to sue only for a Fourteenth
26 Amendment liberty deprivation claim, but not for the state tort
27 of wrongful death because they were not dependent on Price.
28 Robert Price Deposition (Lodged as Exh. 10) 8:23-9:17; Reynolds
v. County of San Diego, 858 F.Supp. 1064, 1069 (D.C. So.Cal.
1994).

1 Based on these developments, the County of San Diego and former
2 Sheriff Jim Roache move for summary judgment because, inter alia,
3 there is no scientific evidence to support the proposition that the
4 hogtie restraint causes hypoventilation or asphyxiation. As a result,
5 there is no basis for claiming that these Defendants were deliberately
6 indifferent to any risk associated with the use of the hogtie
7 restraint as a police tactic.

8 These moving defendants also join into the concurrently filed
9 motion for summary judgment by the defendant deputies.

10 STATEMENT OF FACTS

11 A. Law Enforcement Contact.

12 On June 28, 1994, deputies Groff and Clause were dispatched to
13 Tobiasson Street, Poway, to investigate a citizen's 911 call of a man
14 throwing rocks at her house. (John Groff Deposition (Lodged as Exh.
15 1) "Groff Depo" p. 42, ll 1-9; Steven Clause Deposition (Lodged as
16 Exh. 2) "Clause Depo" p. 29, ll. 10-12.) Groff and Clause contacted a
17 man, Price, at Tobiasson and Shallman Streets, who matched the
18 caller's description. (Groff Depo 44:7-9.) Price told Groff he was
19 fixing his mirror on his truck and pointed to "a friend's house" as
20 his destination, then said "I got to go" and he left and pulled out.
21 (Groff Depo 44:11-12, 44:20-23, 45:8-9.) Price then drove north on
22 Tobiasson passing the house he told Groff he was going to. (Groff
23 Depo 45:19-24.) Groff and Clause elected to further question Price,
24 stopping him at the intersection of Tobiasson and Vaughn. (Groff Depo
25 46:1-16; Clause Depo 33:6-10.) There, Price became uncooperative and
26 started fighting with Groff and Clause. (Groff Depo 53:3-22; Clause
27 Depo 41:5-10.)

28 ///

1 Without using any neck restraint or impact weapons, and only
2 using OC (pepper) spray, Price was wrestled on the ground for
3 handcuffing. (Groff Depo 56:3-6; Clause Depo 43:17-22.) While on the
4 ground handcuffed, Price repeatedly smashed his face into the pavement
5 and continued to fight and kick. (Groff Depo 56:17-19; Clause Depo
6 46:24-25, 47:1-4.) Clause called for backup. (Clause Depo 44:25.)
7 Deputies Sheppard and Talley then arrived on the scene. (Clause Depo
8 47:25; Samuel Sheppard Deposition (Lodged as Exh. 3) "Sheppard Depo"
9 p. 31, ll. 9-16.) Price continued to fight and kick. (Groff Depo
10 58:9-10; Clause Depo 48:19-20.) Talley retrieved leg shackles from
11 his patrol car, and called for paramedics due to Price's self-
12 inflicted facial injuries. (Groff Depo 58:20-22; Clause Depo 52:21-
13 22; Mark Talley Deposition (Lodged as Exh. 4) "Talley Depo" p. 52, ll.
14 2-4.) Even after leg shackles were applied, Price continued to kick,
15 (Talley Depo 53:21-25, 54:1; Sheppard Depo 39:11-22) he was then put
16 into a four-point ("hogtie") restraint. This was accomplished by
17 using a second set of handcuffs to connect the chain of the wrist
18 handcuffs to the chain of the leg shackles. (Talley Depo 53:7-10;
19 Sheppard Depo 39:11-22.)

20 While in the hogtie restraint, Price was in various positions on
21 his left and right flanks and on his stomach. (Talley Depo 55:18-20.)
22 Price struggled against the hogtie restraint. (Talley Depo 56:9-14.)
23 While hogtied, he was first seen to be breathing heavily, followed by
24 shallow breathing corresponding to a cessation of his struggle against
25 the restraint. (Talley Depo 56:18-21.) His pulse was checked and
26 noted to be absent. (Talley Depo 58:1-3; Sheppard Depo 43:10-13.)
27 The hogtie restraint was immediately undone. (Sheppard Depo 44:3-7;
28 Talley Depo 59:19-20.) Simultaneously, paramedics arrived. (Sheppard

1 Depo 44:19-20, 44:24-25.) Talley estimates the hogtie restraint was
2 in place for approximately 3½ minutes, and approximately 70 seconds
3 used to remove the restraints. (Talley Depo 54:21-22, 55:3-4, 56:14,
4 57:12-17, 60:9-13, 60:18-20.) Plaintiffs' police procedures expert,
5 Louis Reiter, estimates that the hogtie was applied for no more than 7
6 or 9 minutes. (Louis Reiter Deposition (Lodged as Exh. 7) "Reiter
7 Depo" p. 5, l.13.) Price was transported to Pomerado Hospital for
8 emergency care where he died two days later. (Groff Depo 70:22-24.)

9 As to Price's resistance and application of the hogtie, it is
10 undisputed that: The deputies did not cause Price to act violently.
11 (Reiter Depo 54:20.) The deputies appropriately subdued Price.
12 (Reiter Depo 68:2.) The deputies appropriately used OC spray and body
13 weight on Price to overcome his resistance. (Reiter Depo 53:13;
14 67:24.) The hogtie restraint is lawful. (Reiter Depo 38:25.) It was
15 appropriate for the deputies to hogtie Price. (Reiter Depo 55:25.)

16 B. Medical Examiner's Positional Asphyxia Diagnosis
17 Not Based On Medical Evidence.

18 During the course of decedent's treatment at Pomerado Hospital,
19 the hospital's pulmonary consultant, James S. Otoshi, M.D., opined
20 that decedent's condition was probably due to a cardiac arrest
21 resulting from exertion and methamphetamine ingestion. (James S.
22 Otoshi, M.D. Report dated 6/28/94 (Lodged as Exh. 18.) "Otoshi
23 Report".) Dr. John Eisele of the Medical Examiner's Office conducted
24 Price's autopsy and concluded that Price died from positional
25 asphyxia² due to application of the four-point restraint. (John Eisele

26
27 ²Asphyxia is the reduction of arterial blood oxygen levels
28 with a corresponding increase in arterial blood carbon dioxide
levels beyond normal life sustaining levels. (Reay Depo 15:22-
16:6.)

1 Deposition, Vol. II (Lodged as Exh. 8) "Eisele Depo, Vol. II" p. 136,
2 ll. 21-25) Price's body had no anatomical conditions demonstrating
3 positional asphyxia. (Eisele Depo, Vol II, 137:1-10, 138:3-7.) There
4 was also no indication of suffocation.³ (Donald Reay Deposition
5 (Lodged as Exh. 6) "Reay Depo" p. 14, 1.17.) Dr. Eisele disregarded
6 Dr. Otoshi's opinion because Dr. Eisele believed that the amount of
7 methamphetamine found in Price's system was minimal, that is, not of a
8 toxic level typically associated with an overdose diagnosis.⁴ (Eisele
9 Depo, Vol II 163:3-6.) Although Dr. Eisele concedes that death might
10 have resulted even without application of the hogtie restraint, he
11 steadfastly opined that the death occurred due to the application of
12 the restraint. (Eisele Depo, Vol. II 219:21-23.) Eighty percent of
13 his opinion was based on the history of the event from one police
14 report and a Sheriff's detective's oral description to him of the
15 incident. (Eisele Depo, Vol. II 141:17-23, 159:1-8.) Fundamental to
16 his diagnosis is his reliance on articles by plaintiffs' expert Dr.
17 Donald Reay, Chief Medical Examiner for King County, Washington, which
18 suggest hogtying causes positional asphyxia, although no scientific
19 data shows the two to be directly connected and plaintiffs have no
20 epidemiological (human statistical) studies regarding the frequency of
21

22
23 ³Suffocation is the occlusion of the external orifices of
24 the airway. (Reay Depo 14:13-17.)

25
26 ⁴Without exception each of plaintiffs' expert physicians
27 have testified that methamphetamine's lethality is unassociated
28 with any particular amount. (Reay Depo 44:13-17; Robert
MacFarlane Deposition (Lodged as Exh. 9) "MacFarlane Depo" p. 16,
11. 6-17; 57:1-58:15.)

1 the hogties' use and occurrence of death. (Eisele Depo 145:3-24,
2 147:4-7; 149, 158:7-1; Reay Depo 79:16-17.)

3 According to Dr. Reay, physical exertion, such as fighting with
4 police, reduces blood oxygen levels. (Reay Depo 16:7-16.)

5 Thereafter, the strain of tying a person's wrists to his ankles behind
6 the back to achieve the hogtie position arches the person's back and
7 stretches the chest and abdomen. (Reay Depo 13:6-25, 25:13-26, 49:8-
8 18.) This keeps the chest and abdomen from fully expanding, thus
9 preventing deep breathing which in turn reduces the blood's oxygen
10 supply. (Reay Depo 13:6-25, 25:13-26, 49:8-18.) When a hogtied
11 person is left on his stomach, body weight flattens the chest and
12 restricts diaphragmic movement by pressing the stomach up against the
13 diaphragm making breathing difficult, thus reducing ventilatory
14 capacity. (Reay Depo 13:6-25, 25:13-26, 49:8-18.) The combined
15 effect of exertion, the reduction of ventilatory capacity induced by
16 the hogtie and prone positioning is thus said to reduce the oxygen
17 level of the blood that feeds the heart, which in turn causes the
18 heart to experience a dysrhythmia,⁵ thus resulting in death by
19 asphyxiation. (Reay Depo 13:6-25, 25:13-26, 49:8-18.)

20 Dr. Reay reported his hypotheses regarding the relationship
21 between asphyxia and the hogtie restraint in two articles: the first
22 entitled "Effects of Positional Restraint on Oxygen Saturation and
23 Heart Rate Following Exercise," The American Journal of Forensic
24 _____

25 ⁵Quite significantly, Dr. Eisele reticently acknowledges
26 that there is no empirical evidence that the hogtie precipitates
27 cardiac events, and in his estimation, there is less than a one
28 percent probability that the hogtie restraint would precipitate a
cardiac arrest. (John Eisele Deposition "Eisele Depo," Vol. II,
p. 145, ll. 9-11; 147:1-12.)

1 Medicine and Pathology, 9(1):16-18 (1988), and a second entitled
2 "Positional Asphyxia During Law Enforcement Transport," The American
3 Journal of Forensic Medicine and Pathology, 13(2):90-97 (1992).
4 Although Dr. Reay's articles report on pulmonary gas exchange issues,
5 he has never considered such matters. (Reay Depo 66:10-22.) In
6 conducting his experiment, he was not concerned with accuracy. (Reay
7 Depo 81:7-11.)⁶

8 In Dr. Reay's first article, he reported the results of an
9 experiment he conducted using a pulse oximeter machine to monitor
10 blood oxygen saturation levels which purported to show that
11 oxygenation levels decreased after exercise and placement in the
12 hogtie position. However, by Dr. Reay's concession, that experiment
13 was crude and perhaps flawed. (Reay Depo 80:2, 81:7-23, 26:5-7.) His
14 experiment neither demonstrated that asphyxia was induced by the
15 hogtie restraint, nor did he make any such conclusion in his first
16 article. (Reay Depo 18:18.) He made that conclusion in his second
17 article which was not supported by any new experimental data. (Reay
18 Depo 18:23.) His experiment did not make any findings as to the
19 levels of carbon dioxide generated by individuals in the hogtie
20 position after exercise and his conclusion that hypercapnia results
21 from the hogtie restraint was only a surmise and not a measured
22 consequence of any experiment or study. (Reay Depo 20:5, 20:12.) His
23 experiment generated no spirometry data as to affects of the hogtie on
24 ventilatory capacity, i.e., the flows and volume of air in and out of
25

26 ⁶Based on Dr. Reay's testimony, it is evident that the
27 methodology of his experiment was not subject to validation or
28 review by scientists specializing in pulmonary medicine as a
condition to publication.

1 a person's lungs, although such data is pertinent to his hypotheses.
2 (Reay Depo 25:13-23.)⁷ His conclusion that there is a restriction of
3 ventilation which adversely affects pulmonary gas exchange function
4 was a surmise. (Reay Depo 25:22-26:25.)

5 Dr. Reay acknowledges that Julius H. Comroe's text book entitled
6 "Physiology of Respiration" is authoritative. (Reay Depo 62:2.) As
7 blood oxygen saturation increases there is a corresponding increase in
8 the pressure of oxygen." (Reay Depo 64:13-15.) Pressure of oxygen
9 "PO2" measurements are more reliable in assessing physiology of body
10 fluids than oxygen saturation by pulse oximetry. (Reay Depo 23:14.)
11 In measuring blood gas, use of arterial blood would be more accurate
12 than pulse oximetry and a study using arterial blood would be superior
13 to his experiment which was non-invasive and so did not use arterial
14 blood samplings. (Reay Depo 80:12-21.) Reay agrees with Comroe's
15 text that with exercise the pressure of carbon dioxide "PCO2"⁸
16 decreases and the PO2 increases. (Reay Depo 65:11-13, 66:2-9.) He is
17 unable to account for why in his study and articles he reports just
18 the opposite. (Reay Depo 66:10-22.) However, considering the
19 articles regarding the inaccuracy of pulse oximetry in measuring blood
20 oxygen levels, Dr. Reay admits that his study was perhaps flawed.
21 (Reay Depo 81:7-23.) If with exercise oxygen levels remain level or
22 ///

24 ⁷In fact, Dr. Reay does not even know how to measure
25 ventilatory capacity. (Reay Depo 86:5-8.)

26
27 ⁸PCO2 is the concept used to accurately measure blood carbon
28 dioxide levels and is the best measurement of the adequacy of
ventilation.

1 increase (as set forth in Comroe's text), it cannot be concluded that
2 the hogtie precipitated positional asphyxia. (Reay Depo 54:15-20.)

3 C. Law Enforcement Employment of the Hogtie Restraint.

4 In June 1992, the City of San Diego Police Department "SDPD"
5 issued the "Final Report of the Custody Death Task Force" (Lodged as
6 Exh. 19) ("Task Force Report"). Relying on Reay's articles, SDPD
7 proclaimed its abandonment of the hogtie restraint when transporting
8 suspects. (Task Force Report pp. 6, 12.) The Task Force report was
9 forwarded to and received by the San Diego County Sheriff's
10 Department. (Jim Roache Deposition (Lodged as Exh. 11) "Roache Depo"
11 p. 9, ll. 4-10.) Former Sheriff Roache ordered the Task Force Report
12 analyzed for its possible impact on Sheriff Department operations.
13 (Roache Depo 31:9-23.)

14 Prior to Price's June 28, 1994, incident, and contrary to SDPD's
15 proclamation, the Sheriff's Department did not abandon use of the
16 hogtie restraint, nor did it provide any training which informed the
17 defendant deputies that the hogtie restraint could cause positional
18 asphyxia. (Roache Depo 27:12-14, 52:16-20; Thomas Snowden Deposition
19 (Lodged as Exh. 12) "Snowden Depo" p. 31, ll. 18-25, 32:1-25, 33:3-6.)
20 Whether the hogtie restraint actually could induce asphyxia was
21 unresolved in the Sheriff's perspective since the physiological
22 effects of the restraint were not fully investigated; as Sheriff
23 Roache pointedly testified, "I felt that the Task Force Report lacked
24 some scientific foundation to validate the conclusions reached by the
25 committee." and "I was troubled by the lack of validation." (Roache
26 Depo 29:25-30:2, 30:21-22.) As of May 1995, not even the California
27 Department of Justice's Commission on Peace Officer Standards and
28 Training ("POST") had promulgated any training or training measures

1 pertaining to the hogtie restraint and positional asphyxia. (Reiter
2 Depo 35:19.) POST promulgates standards and training to enhance
3 effective law enforcement services. Cal. Pen. Code §§ 13503(e),
4 13510(a). Plaintiffs have no information as to the number of law
5 enforcement agencies in the State of California that have abandoned
6 the use of the hogtie restraint. (Reiter Depo 34:10-13.) Plaintiffs
7 have no information as to the number of law enforcement agencies in
8 the County of San Diego that presently use the hogtie restraint or
9 whether any have abandoned use of it (Reiter Depo 34:19-35:1.)⁹

10
11 D. University of California San Diego Pulmonary Study
12 On Hogties and Positional Asphyxia.

13 Using grant funds provided by the County of San Diego and the
14 National Institutes of Health, a team of UCSD Medical Center
15 physicians conducted an experiment to ascertain the effects of the
16 hogtie restraint on pulmonary gas exchange function. (Thomas Neuman,
17 M.D. Deposition (Lodged as Exh. 5) "Neuman Depo" p. 12, ll. 3-9.) The
18 methodology, experimental findings and conclusions of the UCSD
19 experiment are set forth in the paper entitled "Restraint Position and
20 Positional Asphyxia" (Lodged as Exh. 13) ("RP&PA") which is to be
21 submitted for publication with the Journal of the American Medical

22 ⁹Although plaintiffs' police procedures expert has no
23 opinion on whether Dr. Reay's hypothesis that the hogtie
24 restraint causes asphyxia is accurate, in rendering his opinion
25 that the County, by failing to follow SDPD's lead, was
deliberately indifferent to the risks of the restraint he assumes
that Reay's hypotheses are correct. (Reiter Depo 22:11, 46:4.)

26 If the assignment of the risk to the restraint technique is
27 wrong, that is, there is no scientific or medical basis for the
28 assignment of the risk, then he and opponents of the hogtie
restraint are being led by "charlatans". (Reiter Depo 23:4-17.)

1 Association. (Neuman Depo 15:19-22; RP&PA.) Based upon the findings
2 of that study, the authors of the article, including Thomas Neuman,
3 M.D., conclude that ". . .there is no evidence that body position
4 while in the 'hogtie' or 'hobble' restraint position causes
5 hypoventilation or asphyxiation." (Neuman Depo 55:12-13; RP&PA p.
6 12.)

7 UCSD's study on the subject revealed that Dr. Reay's work on
8 hogtying and asphyxiation suffered from three fundamental errors.
9 First, Dr. Reay did no spirometrical assessment of his subjects. He
10 therefore had no foundational basis upon which to say how much the
11 hogtie restraint interferes with ventilation (breathing) or whether
12 the restraint had any impact of blood gas exchange. Second, Reay
13 reported that oxygen saturation dropped with exercise. He could not
14 explain this anomaly which is inconsistent with Comroe's medical text
15 book on respiratory physiology which teaches arterial blood oxygen
16 levels actually increase with exertion. Third, although Dr. Reay
17 acknowledged that arterial PO2 measurements are the only accurate way
18 to ascertain true oxygen saturation levels, he never measured arterial
19 PO2 levels in the subjects he used to illustrate his hypotheses, but
20 rather relied on the highly inaccurate pulse oximeter. (RP&PA p. 10-
21 11; Neuman Depo 11:6-13:21.)

22 The UCSD Medical Center study did spirometry, arterial
23 saturation, arterial PO2, and arterial PCO2 measurements on 15 normal
24 males whose body mass index included Price's body mass index. (Neuman
25 Depo 31-32, 39:5-8; RP&PA pp. 4-6.) The experiment's design and
26 protocol were reviewed and approved by the Human Subjects Committee of
27 the University of California, San Diego. (Neuman Depo 15:10-13; RP&PA
28 pp. 4-6.)

1 The study demonstrated the effect the hogtie on ventilation
2 through spirometry measurements. (Neuman Depo 31-32.) As compared to
3 the unencumbered sitting position, forced vital capacity "FVC" is
4 reduced by 6.8% when lying on one's back, 7.3% when lying on one's
5 stomach, and 13.3% in the hogtie position. (RP&PA p. 7.) Notably, FVC
6 increased by 3% while in the hogtie position after exercise. (Neuman
7 Depo 37:14-23; RP&PA p. 7.) These changes are not, however, of any
8 clinical import because there is no interference with pulmonary gas
9 exchange function and the measurements remained within normal range.
10 (Neuman Depo 35-36, 50.)

11 The study demonstrated the effects of exercise and the hogtie on
12 pulmonary gas exchange measuring arterial PO₂ and PCO₂ before and
13 after exercise and during rest in the sitting and restraint
14 positions. (Neuman Depo 34-38.) Sitting position: Before exercise, the
15 subjects had a base PO₂ of 91.4, and base PCO₂ of 38.5.¹⁰ (RP&PA p.8.)
16 After 4 minutes of exercise, PO₂ levels increased to 108.7, and PCO₂
17 fell to 34.5. (RP&PA p. 8.) After 1.5 minutes of post-exercise rest,
18 PO₂ levels elevated even further to 122.7, and PCO₂ fell even further
19 to 31.3. (RP&PA p. 8.) After 15 minutes of rest, PO₂ levels fell
20 back towards normal to 102.4, and PCO₂ rose back towards normal to
21 32.9. (RP&PA p. 8.) An increase in PO₂ shows there is an increased
22 amount of oxygen in arterial blood. (Neuman Depo 34.) PCO₂ indicates
23 ventilatory efficiency. (Neuman Depo 41:16.) An increase in PCO₂
24 corresponds to impaired ventilation. (Reay Depo 49:23-50:1.) The
25 hogtie restraint: Using the PO₂ and PCO₂ levels after 15 minutes of

26
27 ¹⁰All blood gas measurements are in mmHg. The raw data
28 showing the recited measurements are contained in Exhibits 3 and
6 of Neuman's Depo.

1 rest after the subjects' initial phase of exercise as a base, after an
2 additional 4 minutes of exercise, PO2 levels rose from 102.5 to 109.8,
3 and PCO2 fell from 32.9 to 30.7. (RP&PA p. 8.) Immediately after
4 each subject stopped their second phase of exercise, each was placed
5 into the hogtie (which took an average of 1.5 minutes following the
6 cessation of exercise). PO2 was measured at that time and found to
7 have risen even further to 114, PCO2 was measured at 31. (RP&PA p.
8 8.) After 15 minutes in the hogtie, PO2 fell back towards normal to
9 99.1, and PCO2 rose towards normal to 32.7. (RP&PA p. 8.) The post-
10 exercise hogtie results are substantially the same as the results
11 obtained from measurements following rest after exercise without any
12 restraint. (See prior 1st phase exercise results above.)
13 Importantly, PCO2 was not significantly different in the sitting and
14 hogtie positions. (Neuman Depo 42:11-18.)

15
16 SUMMARY JUDGMENT STANDARD AND THE
ADMISSIBILITY OF EXPERT SCIENTIFIC EVIDENCE

17 Summary judgment serves to isolate and dispose of factually
18 unsupported claims. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324
19 [91 L.E.2d 265] (1986). Federal Rules of Civil Procedure, rule 56(e)
20 requires plaintiffs as the non-moving parties to go beyond the
21 pleadings and by affidavits, depositions, answers to interrogatories,
22 etc., designate "specific facts showing that there is a genuine issue
23 for trial." Celotex Corp., 477 U.S. at 323-324. Generalized
24 references to evidence are insufficient. Hansen v. United States, 7
25 F.3d 137, 138 (9th Cir. 1993); Nissho-Iwai American Corp. v. Kline,
26 845 F.2d 1300, 1307 (5th Cir. 1988). Summary judgment cannot be
27 defeated by reliance on one's pleadings. Celotex Corp., 477 U.S. at
28 323-324. Genuine issues of material fact sufficient to overcome

1 defendants' motion for summary judgment cannot be created simply by
2 making argumentative assertions in legal memoranda. S.A. Empresa,
3 Etc. v. Walter Kidde & Co., 690 F.2d 1235 (9th Cir. 1982). To
4 withstand a motion for summary judgment, the non-moving party must
5 show that there are "genuine factual issues that properly can be
6 resolved only by a finder of fact because they may reasonably be
7 resolved in favor of either party." Anderson v. Liberty Lobby, Inc.,
8 477 U.S. 242, 250 [91 L.Ed.2d 202] (1986). If the factual context
9 makes the non-moving party's claim implausible, the party must come
10 forward with more persuasive evidence than would otherwise be
11 necessary to demonstrate that there is a genuine issue for trial.
12 California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics,
13 Inc., 818 F.2d 1466, 1468, (9th Cir. 1987) cert. denied, 484 U.S. 1006,
14 (1988).

15 Summary judgment must be entered in cases where the plaintiffs
16 fail to adduce enough admissible evidence to create a genuine issue of
17 material fact on causation. Daubert v. Merrell Dow Pharmaceuticals,
18 Inc., 43 F.3d 1311, 1315 (9th Cir. 1995). If, in this case, the
19 expert scientific evidence plaintiffs proffer to prove that the hogtie
20 restraint causes positional asphyxia is excludable at trial because it
21 does not qualify as reliable "scientific knowledge", then summary
22 judgment should be granted. Daubert, 43 F.3d at 1315.

23 ARGUMENT

24 I

25 THE PLAINTIFF'S CLAIM AGAINST THE COUNTY 26 UNDER SECTION 1983 IS WITHOUT MERIT

27 Where "execution of a government's policy or custom, whether made
28 by its lawmakers or by those whose edicts or acts may fairly be said

1 to represent official policy, inflicts [a constitutional] injury, then
2 the government as an entity is responsible under § 1983." Monell v.
3 New York City Dept. of Soc. Serv., 436 U.S. 658, 694 [56 L.Ed.2d 611]
4 (1978). "Four conditions . . . must be satisfied in order to establish
5 municipal liability for failing to act to preserve constitutional
6 rights: '(1)that the plaintiff possessed a constitutional right of
7 which he was deprived; (2) that the municipality had a policy; (3)
8 that this policy 'amounts to deliberate indifference' to the
9 plaintiff's constitutional right; and (4) that the policy is the
10 'moving force behind the constitutional violation.'" Oviatt v.
11 Pearce, 954 F.2d 1470, 1474 (9th Cir. 1992) (Oviatt), quoting Canton,
12 489 U.S. at 389-91." Van Ort v. Estate of Stanewich, et al., 96 Daily
13 Journal D.A.R. 9492, 9493 (filed 8/6/96).¹¹

14 To act with deliberate indifference is the equivalent of
15 recklessly disregarding a substantial risk of harm. Farmer v.
16 Brennan, 511 U.S. . . . [128 L.Ed.2d 811, 828] (1994). Actual causation
17 is a necessary element as . . ."Congress did not intend § 1983 liability
18 to attach where such causation was absent." Monell, 436 U.S. at 692.
19 Although causation is typically a jury question, it becomes a question
20 of law when the available evidence allows only one conclusion or when
21 the evidence is insufficient to establish causation. Lutz v. U.S.,
22 685 F.2d 1178 (9th Cir. 1982); Benshoof v. National Gypsum Co., 978

24 ¹¹The first step in plaintiffs' Monell claim is to prove
25 that the defendants violated plaintiffs' constitutional rights by
26 using excessive force in subduing Price during the June 28, 1994,
27 incident. If this Court rules in connection with the individual
28 defendant deputies' summary judgment motion that there was no
excessive force used on Price, plaintiffs' Monell claim against
the County becomes moot. Forrester v. City of San Diego, 25 F.3d
804, 808 (9th Cir. 1994).

1 F.2d 475, 476 (9th Cir. 1992) "[W]hen a plaintiff's evidence 'does
2 not establish a causal connection, leaving causation to the jury's
3 speculation, or where reasonable persons could not differ on the
4 inference derived from the evidence,' should the court remove this
5 question from the jury." Benshoof, 978 F.2d at 476.

6 Plaintiffs' Monell claim is premised on the contention that the
7 County, by failing abandon use of the hogtie restraint and not
8 training its deputies about the restraint's ability to cause
9 positional asphyxiation, was deliberately indifferent to a substantial
10 risk of harm that could be imparted to persons on whom the restraint
11 is applied. Plaintiffs' contention supposes above all else that the
12 restraint does in fact cause asphyxiation. There is, however,
13 absolutely no medical evidence to support the supposition that the
14 hogtie restraint causes asphyxia.

15 To be admissible as evidence, expert scientific testimony must
16 reflect scientific knowledge having been derived by the scientific
17 method such as to amount to good evidence, and advance a material
18 aspect of the case. Daubert, 43 F.3d at 1315. In determining whether
19 the scientific evidence is reliable the courts consider a multitude of
20 factors such as whether the expert is testifying about a matter within
21 his expertise, whether the expert's theory is generally accepted
22 within the scientific community, whether the expert's methodology for
23 any experiment utilized to advance his opinions was generally accepted
24 in the scientific community, whether the expert's findings were
25 subject to peer review for validation, and whether the expert's
26 opinion is based on work with a known or potential rate of error which
27 is acceptable. *Id.* at 1315.

28 ///

1 Plaintiffs do not have any admissible expert scientific testimony
2 to prove the hogtie causes positional asphyxia. Plaintiffs' expert on
3 causation is Dr. Reay, a medical examiner, not a respiratory
4 physiologist, who renders an opinion pertaining to pulmonary
5 functions, but who does not even claim that he has a working
6 understanding of the material set forth in Comroe's text on the
7 "Physiology of Respiration". (Reay Depo 61:17-24, 88:14.) He last
8 worked as a physician with live persons in 1969. (Reay Depo 40:15.)
9 In conducting his hogtie experiment he measured blood oxygenation
10 levels through pulse oximetry, a method fraught with error potentials
11 of which he was not even aware. (Reay Depo 80:22-82:15.) He does not
12 know whether the pulse oximeter machine he used was calibrated. (Reay
13 Depo. 57.) He did no pre-experiment examinations of the experiment
14 participants to determine whether they were of normal lung functioning
15 so to assure proper experiment results. (Reay Depo 59:20-23.) His
16 experiment's oximeter readings did not account for the effects of
17 carboxyhemoglobin, a compound found in smokers, although some of the
18 participants were smokers. (Reay Depo 59:9-14.) Although arterial
19 blood sampling is the most accurate means by which to measure blood
20 gas content he never used this technique. He never obtained CO2
21 measurements of any kind. He never obtained spirometry measurements.
22 He never obtained PO2 measurements. He cannot explain the anomalous
23 findings and conclusions of his experiment that oxygen saturation
24 levels decreased with exercise although an authoritative medical text
25 is to the contrary. His opinion is inadmissible. Lust v. Merrell Dow
26 Pharmaceuticals, Inc., 96 D.A.R. 8334, 8336 (9th Cir. 7/11/96). He
27 does not contend that his experimental methodology on asphyxia has
28 ever been subjected to peer review. In fact as of the date of his

1 deposition he had never been confronted with or considered the
2 pulmonary gas exchange issues presented to him in his deposition.
3 (Reay Depo 66:10-22.) Dr. Reay most certainly does not contend that
4 the methods he used in his experiment were anything but crude. In the
5 final analysis, Dr. Reay's opinion is but an amalgam of suppositions
6 and surmises. Without the benefit of any scientific data he surmised
7 that the hogtie adversely affects pulmonary gas exchange function, and
8 causes hypercapnia, hypoxia, hypoventilation, and asphyxia.

9 Juxtaposed to Reay's "crude" experiment, the University of
10 California San Diego conducted a study which satisfies all the
11 protocols of Daubert albeit having arisen in the litigation context.
12 The study was funded in part by a grant to UCSD from the County.
13 These funds were not paid to Dr. Neuman. Four University pulmonary
14 physicians cooperated in producing the report which was based on an
15 experiment whose methodology was validated by peer review through the
16 University's human use committee. The data generated by the
17 experiment cannot therefore be reasonably said to have been influenced
18 by a litigation driven financial incentive.

19 The results the UCSD study clearly demonstrate that asphyxiation
20 does not occur during exertion or while hogtied. It further shows
21 that the Medical Examiner's diagnosis of positional asphyxia due to
22 application of the hogtie is not scientifically tenable and that
23 plaintiffs have no admissible scientific expert testimony to support
24 causation. The hogtie did not asphyxiate Price.

25 Before UCSD did the positional asphyxiation study, no controlled
26 study had ever been done to confirm or disaffirm Dr. Reay's
27
28

1 hypotheses.¹² His conclusions were simply accepted as true by the
2 City of San Diego, which banned use of the hogtie because of its
3 asphyxiation potential. The Sheriff's Department was aware of the
4 City's ban on hogties, but did not follow suit. Thus rose the spectre
5 that the Sheriff's Department was deliberately indifferent to an
6 obvious risk of death or serious bodily injury. The UCSD Medical
7 Center study exposes the fallacy of Dr. Reay's hypotheses and the
8 inadmissibility of his expert opinion regarding causation.

9 That the County did not act upon Dr. Reay's erroneous
10 suppositions regarding the dangers of the hogtie restraint, but rather
11 continued to use the restraint, neither created nor presented any
12 unreasonable risk of harm to citizens. Because the restraint does not
13 cause hypoventilation, hypercapnia, hypoxia or asphyxia, there was no
14 attendant risk of injury. As a matter of law, the County was not
15 deliberately indifferent to any harm presented by its use.
16 Plaintiffs' case fails because there is no admissible proof that the
17 hogtie restraint causes positional asphyxia. As a matter of law, the
18 County is entitled to summary judgment on plaintiffs' Monell claim.

19 II

20 NO CAUSE OF ACTION CAN BE STATED AGAINST SHERIFF 21 ROACHE ABSENT A SHOWING OF PERSONAL RESPONSIBILITY

22 Under state and federal law there is no vicarious liability
23

24 ¹²Up until UCSD's study, no study has ever been conducted on
25 the actual pulmonary effects of the hogtie. (Reay Depo 61:13,
26 79:16-19.) No one until now, in the scientific community has
27 deemed Dr. Reay's first article and experiment worthy of
28 validation. It is as though there was a tacit understanding that
what has been occurring relative to the hogtie/positional
asphyxia controversy has been litigation and not science. cf.
Daubert, 43 F.3d at 1318.

1 against public employees. Since plaintiffs cannot show facts
2 indicating they incurred any injury as a result of Sheriff Roache's
3 personal conduct, the Sheriff is entitled to summary judgment on all
4 causes of action.

5 A. State Law.

6 Under state law, the doctrine of respondeat superior is
7 inapplicable to public servants. Cal. Gov't Code § 820.8. Section
8 820.8 states:

9 "Except as otherwise provided by statute, a public
10 employee is not liable for an injury caused by the act or
11 omission of another person. Nothing in this section
12 exonerates a public employee from liability for injury
proximately caused by his own negligent or wrongful act or
omission."

13 Without question, neither the head of a law enforcement agency nor
14 co-employees, are responsible for acts of subordinates or co-workers:

15 "A public officer is not responsible for the acts or
16 omissions of subordinates properly employed by or under him,
17 if such subordinates are not in his private service, but are
18 themselves servants of the government, unless he has
directed such acts to be done or has personally co-operated
therein." Michael v. Smith, 188 Cal. 199, 201 (1922).

19 B. Federal Law.

20 It is well-recognized in section 1983 jurisprudence that there is
21 no respondeat superior liability. Taylor v. List, 880 F.2d 1040, 1045
22 (9th Cir. 1989). A superior cannot be held personally liable under
23 section 1983 for constitutional deprivations allegedly caused by his
24 subordinates absent his participation or direction in the alleged
25 deprivation. Ybarra v. Reno Thunderbird Mobile Homes Village, 723
26 F.2d 675, 680 (9th Cir. 1984). Accordingly, Sheriff Roache is
27 entitled to summary judgment on all of plaintiff's claims because

28 ///

1 there is no evidence to show that the Sheriff personally inflicted, by
2 deed or decision, any injury on plaintiffs.¹³

3 III

4 THE COUNTY IS ENTITLED TO SUMMARY JUDGMENT
5 ON PLAINTIFFS' CAUSE OF ACTION FOR NEGLIGENT
HIRING, TRAINING, RETENTION AND SUPERVISION

6 In California all tort liability against a public entity is
7 dependent on the existence of an authorizing statute. Searcy v. Hemet
8 Unified School Dist., 177 Cal.App.3d 792, 802 (1986); Gonzales v.
9 State of California, 29 Cal.App.3d 585, 590 (1972); Gov't Code, §
10 815(a). There is no statutory authority for plaintiffs' cause of
11 action against the County for negligent hiring, training, supervision
12 and retention. Given the absence of any statutory authority pertaining
13 to the direct imposition of liability on the County for negligent
14 hiring etc., plaintiff's cause of action fails because it is not
15 authorized by law. Van Ort, 96 DAR at 9496-9497.

16 IV

17 PLAINTIFFS CANNOT MAINTAIN A SEPARATE CLAIM
18 UNDER CALIFORNIA CIVIL CODE SECTION 52.1

19 A. No Substantive Rights Are Conveyed by Section 52.1.

20 Plaintiffs' first amended complaint at paragraph 8 on page 3 of
21 form 1A-5, alleges violation of Cal. Civ. Code § 52.1. Yet plaintiffs
22

23 ¹³If plaintiffs have named Sheriff Roache because of his
24 official capacity, then this is not a lawsuit against him
25 personally, but rather his office. As such it is no different
26 than a lawsuit against the governmental entity for whom the
27 official acts. See Brandon v. Holt, 469 U.S. 464, 471 [83
28 L.Ed.2d 878] (1985); Kentucky v. Graham, 473 U.S. 159, 165-166
[87 L.Ed.2d 114] (1985); Monell, 436 U.S. at 690 n. 55. Thus,
Sheriff Roache would be a superfluous party since the County is
already a defendant.

1 do not allege any conduct by defendants that would constitute a
2 violation of the state constitution but not the federal constitution.
3 "Section 52.1 does not provide any substantive protections; instead it
4 enables individuals to sue for damages as a result of constitutional
5 violations." Reynolds, 84 F.3d at 1170. Absent proof that defendants
6 violated a state constitutional right separate from those accorded by
7 the federal constitution, there is no basis for imposing liability.
8 Id. at 1170

9
10 B. Section 52.1's Legislative History Precludes
Governmental Liability.

11 Cal. Civ. Code § 52.1 does not even apply to, nor was it ever
12 intended to apply to, public employees or entities for alleged
13 violations of civil rights resulting from police activity. Since §
14 52.1 was enacted in 1987, not one reported decision has ever held that
15 a plaintiff may bring an independent action under § 52.1 against
16 police officers or their employers. The purpose of § 52.1 is to give
17 victims of so-called "hate crimes" a remedy against groups such as the
18 Ku Klux Klan, who attempted to terrorize individuals in fear of hate
19 violence by way of "threats, intimidation, or coercion." (Department
20 of Justice Bill Analysis, re: Bill No. AB2683, dated 3/1/90 (Lodged as
21 Exh. 14).¹⁴

22 Despite repeated attempts by lobbyists to add a "damages" remedy
23 to the bill and to delete from the bill the words "threats,
24

25 ¹⁴This exhibit, like Exhibits 15, 16, and 17, were obtained
26 from the official records of the California Assembly and
27 California Senate, and are true and correct copies of documents
28 contained in the enactment history of Chapter 392, statutes of
1990, Assembly Bill 2683 -- Floyd, amending Cal. Civ. Code §
52.1.

1 intimidation, or coercion" so as to make proposed § 52.1 "akin to
2 section 1983", (Letter to Melissa Nappan, CACJ Legislative Office
3 dated 9/21/89 (Lodged as Exh. 15). The bill retained its limiting
4 language. The ACLU was against deletion of the phrase "threats,
5 intimidation or coercion". (Letter to Assemblyman Richard E. Floyd
6 from ACLU Legislative Director and Legislative Advocate to
7 Assemblyman, dated 3/1/90 (Lodged as Exh. 16). The California
8 Department of Justice was concerned that deletion of the phrase
9 "threats, intimidation or coercion" would make the section an
10 "alternative cause of action in virtually every tort action." When
11 the bill, with § 52.1 set forth in its present form, was through the
12 Legislature, its sponsor Assemblyman Richard E. Floyd wrote to
13 Governor Deukmejian urging him to sign it, stating: "this bill does
14 not change the scope of our civil rights law" (Letter to
15 Governor George Deukmejian from Assemblyman Richard E. Floyd, dated
16 7/9/90 (Lodged as Exh. 17.)

17 Section 52.1 does not provide an independent statutory remedy
18 against police officers or public entities. It was proposed and
19 passed as an anti-hate crime statute and this court should refuse
20 plaintiffs' invitation to extend its application to governmental
21 conduct.

22 V

23 DEFENDANTS ARE NOT LIABLE FOR PUNITIVE DAMAGES

24 As a matter of law, the County cannot be held liable for punitive
25 damages. Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981) [69
26 L.Ed.2d 616]; Cal. Gov't Code § 818. As to former Sheriff Jim Roache,
27 there is no evidence that he personally engaged in any conduct which
28 ///

1 could subject him to punitive damage liability under state or federal
2 law.

3 Under Cal. Civ. Code § 3294, punitive damages may be awarded only
4 where a defendant is guilty of oppression or malice. "'Malice' means
5 conduct which is intended by the defendant to cause injury to the
6 plaintiff or despicable conduct which is carried on by the defendant
7 with a willful and conscious disregard of the rights or safety of
8 others." Cal. Civ. Code § 3294(c)(1). "'Oppression' means despicable
9 conduct that subjects a person to cruel and unjust hardship in
10 conscious disregard of that person's rights." Cal Civ. Code §
11 3294(c)(2).

12 Under federal law, punitive damages are considered proper only
13 when the defendant's conduct is shown to be motivated by evil motive
14 or intent, or when it involves reckless or callous indifference to the
15 federally protected rights of others. Smith v. Wade, 462 U.S. 30, 56
16 [75 L.Ed.2d 632] (1983). "Evil motive" is clearly despicable; needing
17 no elaboration. "Reckless indifference," is remarkably similar in
18 definition to section 3294's definitions of malice and oppression:
19 reckless indifference is "conduct that is so wanton or reckless with
20 respect to the 'unjustified infliction of harm as is tantamount to a
21 knowing willingness that it occur, ' . . . it is conduct equivalent to
22 a deliberate choice." Redman v. County of San Diego, 942 F.2d 1435,
23 1443 (9th Cir. 1991). "Reckless" is also found to be synonymous to
24 wanton. (Id. at fn. 10.) In Ward v. City of San Jose, 967 F.2d 280,
25 286 (9th Cir. 1992) the district court relied on § 3294's language in
26 granting the defendant officers a directed verdict on punitive
27 damages. The appellate court upheld the directed verdict stating:
28 "There is absolutely no evidence, however, that the officers acted

1 with evil intent." Ward, 967 F.2d at 286.

2 Under federal or state law, there is absolutely no evidence that
3 former Sheriff Roache's actions in response to the hogtie/positional
4 asphyxia controversy was ill advised, let alone of the unsavory nature
5 required for punitive damage liability. His refusal to act
6 impulsively and his conviction that the Task Force Report's criticism
7 of the hogtie restraint lacked validation have been vindicated by
8 UCSD's study which scientifically establishes that the restraint is
9 innocuous. He is entitled to a judgment of non-liability for punitive
10 damages.

11 CONCLUSION


12 Based on the foregoing, defendants County and Jim Roache
13 respectfully request that this Court issue an order granting summary
14 judgment as follows: Plaintiffs' Monell claim premised on the
15 defendants' alleged deliberate indifference to the asphyxiation
16 dangers of the hogtie restraint is without merit because there is no
17 evidence that the restraint causes hypoventilation or asphyxiation;
18 There is no factual basis for imposing personal liability on former
19 Sheriff Jim Roache; Plaintiffs' state law action under Cal. Civ. Code
20 § 52 cannot support any claim of liability; There is no basis for
21 imposing liability on defendants for negligent hiring, training and
22 supervision.

23 DATED: Sept 3/96

Respectfully submitted,

24 JOHN J. SANSONE, County Counsel (Acting)
25 DIANE BARDSLEY, Chief Deputy

26 By


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